IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

L.W., a minor, by and through his parents, SAMUEL and TINA WHITSON	)	
Plaintiff,	)	
v.	)	**NO. 3:05-cv-00274**
KNOX COUNTY BOARD OF EDUCATION, CHARLES LINDSEY, in his official capacity as Superintendent of Knox County Public School System, and CATHY SUMMA, individually and in her official capacity as Principle of Karns Elementary School,	)	
Defendants,	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT FOR MOTION FOR PREMLIMINARY INJUNCTION

COMES NOW Plaintiff, L.W., by and through counsel, and files this Memorandum in Support of his Motion for Preliminary Injunction.

INTRODUCTION

This case is about a ten-year old child who wishes merely to read his Bible and discuss passages found therein with a friend during recess time at school, and the school officials, who, acting under the authority and weight of the government, refuse to let him.

As a fourth grader at Karns Elementary School ("KES"), L.W. desired to read and discuss the Bible with friends during recess in a corner of the children's playground. Subsequently, officials affiliated with the school forced L.W. to jettison this activity under the threat of reprimand. For the upcoming school year, of 2005/2006, L.W. will be a fifth grader,

which represents his last year at the elementary school. For the remainder of his tenure at the school, L.W. yearns to regain his fundamental constitutional right to read and discuss Bible passages during non-instructional time.

In pursuit of his needed relief, on or about June 1, 2005, L.W. filed the instant action. So as to obtain relief for his fifth grade and final year, L.W. seeks herein a preliminary injunction.

STATEMENT OF FACTS

L.W., son of Tina and Samuel Whitson, is a ten-year-old student at KES. He is currently a fifth grader at the school. (Verified Complaint "Compl." ¶ 14). L.W. is also a Christian who adheres generally to orthodox Christian beliefs. (Compl. ¶ 15). Pursuant to his Christian faith, L.W. seeks opportunities during his free time to read the Bible and discuss the contents with others. (Compl. ¶ 16). This is an essential and indispensable component of his Christian faith. (Compl. ¶ 16).

KES is an elementary school under the jurisdiction, supervision, and control of the Knox County School Board of Education ("Board"). (Compl. ¶ 13). The school has students ranging from kindergarten to the fifth grade. (Compl. ¶ 13).

Recess at KES is a thirty-minute non-instructional time period at the school, and constitutes free time for the students. (Compl. ¶¶ 18, 21; Ex. "A"; Ex. "B"; Ex. "D"; Ex. "E").[1] During recess, students may engage in a variety of activities, including playing on the playground structures, playing games, working on school assignments, reading and discussing books and other materials, resting, talking, as well as any other conceivable activity of interest to students that does not disrupt the function of the school. (Compl. ¶ 22; Ex. "A"; Ex. "B"; Ex. "D"; Ex. "E"). In particular, it is common for students to gather to discuss written materials, such

[1] Each exhibit (Ex.) refers to affidavits of witnesses or other documents submitted in support of Plaintiff's Motion for Preliminary Injunction.

as school assignments, baseball cards, American Girl Doll magazines, comic books, elementary-age books, like Harry Potter, and any other materials that are not banned by the school. (Compl. ¶¶ 23-24; Ex. "A"; Ex. "B"; Ex. "D"; Ex. "E").

During the 2004/2005 school year, L.W. and a classmate decided that during recess they would occasionally go to a corner of the playground, read some passages from the Bible, and talk about what they read. (Compl. ¶ 25). On those days, L.W. brought his Bible to school and met his friend at recess, at which time they would read passages and engage in private discussion on various topics. (Compl. ¶ 27). Subsequently, other students in L.W.'s class sought to take part in the discussion. (Compl. ¶ 29). But no parents or school officials were ever involved. (Compl. ¶ 30).

Around this time, a parent of a non-participating student learned of the private Bible discussion and complained to Cathy Summa, principal at KES. (Compl. ¶ 31). Upon hearing this news, Principal Summa issued a directive to stop the Bible-related activity at once. (Compl. ¶ 33; Ex. "C"; Ex. "E"). L.W. understood that Bible reading and/or discussion on the playground during recess would subject him to reprimand. (Compl. ¶ 35). [2] And the incident signified to L.W. that the school officials at KES believe there is something wrong with his Christian faith. (Compl. ¶ 35).[3]

Soon thereafter, Principal Summa was approached by a group of parents, including Tina Whitson, about the ban on Bible reading and discussion during recess at school. (Compl. ¶¶ 36-38). In response, Principal Summa referred to the recess Bible reading and discussion as a "Bible study," and maintained that students could not conduct such activity during recess time because

[2] This event and understanding is verified by other children in L.W.'s class. (Ex. "C"; Ex. "E").

[3] The same is true with other students in L.W.'s class. (Ex. "C"; Ex. "E").

she considered it to be a violation of the so-called "separation of church and state." (Compl. ¶ 38).

L.W.'s family, through counsel, forwarded a letter to Charles Lindsey, Superintendent of the Knox County Public School System, and the Board about the matter. (Compl. ¶ 39). The letter explained that the ban on Bible reading or discussion during recess adversely impacts L.W.'s constitutional rights to engage in free expression during non-instructional time and requested that the school cease the unconstitutional practice. (Compl. ¶ 39). To date, no one affiliated with KES or the Board has responded to the letter. (Compl. ¶ 40).

In lieu, school officials issued a series of statements to the media and parents elaborating on their position about the matter. (Compl. ¶¶ 41-56; Ex. "F"; Ex. "G"; Ex. "H"). These statements uniformly confirm that students at KES are banned from reading and discussing the Bible during recess. (Compl. ¶¶ 41-56; Ex. "F"; Ex. "G"; Ex. "H"). On May 12, 2005, Principal Summa distributed a letter to KES parents, through their children, confirming that no Bible discussion will be permitted on school grounds during recess. (Compl. ¶ 42; Ex. "F"). In explaining this policy, she states that children can bring their Bibles to school, but they cannot have a "Bible study group" during the school day. (Compl. ¶ 42; Ex. "F").

In addition, on May 12, 2005, at the KES volunteer brunch, Principal Summa advised Tina Whitson, mother of L.W., that "children cannot have a Bible study at recess because then we would have to let the Muslims do their thing." (Compl. ¶ 46). Since, Principal Summa and other school officials have reiterated KES's firm policy of banning students from reading the Bible and/or discussing the Bible during recess. (Compl. ¶¶ 49-56; Ex. "G"; Ex. "H").

According to KES officials, recess time is instructional time. (Compl. ¶ 57; Ex. "G"; Ex. "H"). As a matter of school policy, Bible discussion cannot take place at any time during the

school day, including recess. Such activity is permitted only before or after school hours. (Ex. "G"; Ex. "H").[4]

L.W. now embarks on his fifth grade year. Despite his strong desire to do otherwise, he is chilled and deterred from reading and discussing the Bible during recess at school as a result of Principal Summa's actions and the school's stated policies. (Compl. ¶ 60).

ARGUMENT

In determining the propriety of a preliminary injunction, a district court considers (1) plaintiff's likelihood of success on the merits, (2) possibility of irreparable harm to the plaintiff absent the injunction, (3) whether granting the injunction will cause substantial harm to others, and (4) impact of an injunction on the public interest. *Tucker v. City of Fairfield*, 398 F.3d 457, 461 (6th Cir. 2005). These are not prerequisites to be met, but rather factors to be balanced. *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). As demonstrated herein, L.W. is suffering ongoing irreparable harm and has a high probability of success on his federal and state constitutional claims. The protection of fundamental constitutional rights is clearly in the best interest of the public and will cause no harm to the school's ability to fulfill its educational mission.

I. LIKELY TO SUCCEED ON THE MERITS OF CLAIMS

School officials at KES adopt the untenable position that recess time is instructional time, and under this premise, they flatly prohibit student Bible reading and discussion, or, as Principal Summa puts it, "Bible study," during recess on the playground. Although students at KES are generally free to read and discuss other written materials during recess, such as American Girl

[4] This position was repeated in various public statements by Principal Summa, school attorney Marty McCampbell, and KES spokesperson Russ Oakes. (Compl. ¶¶ 49-56).

Doll magazines and Harry Potter books, children are not permitted to open and discuss their Bibles during the school day. This religious activity is isolated and targeted for a specific ban.

The action of school officials in banning student Bible reading and discussion during recess invokes a variety of constitutional concerns. The ban infringes on L.W.'s right to convey a message in public (violating the free speech clause), precludes the exercise of L.W.'s faith (violating the free exercise clause), demonstrates hostility toward religion (violating the establishment clause), acts as an *ad hoc* bar on speech (violating the due process clause), and does so in discriminatory fashion (violating the equal protection clause).

A. Violates Free Speech

The guiding principles for analyzing student speech in public schools were enunciated by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). In that case, the Court held that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511, 89 S. Ct. at 739, 21 L. Ed. 2d at 740. In this case, school officials at KES have silenced L.W.'s religious speech, and they offer no legitimate reason for the censorship.

1. First Amendment protects student religious speech

It is beyond dispute that religious expression is protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 269, 102 S. Ct. 269, 274, 70 L. Ed. 2d 440, 447 (1981). *See also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S. Ct. 2440, 2446, 132 L. Ed. 2d 650, 660 (1995) ("private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression . . . a free-speech clause without religion would be *Hamlet* without the Prince"). And this protection does not fade on school property. Students are

not required to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506, 89 S. Ct. at 736, 21 L. Ed. 2d at 737. *See Grayned v. City of Rockford*, 408 U.S. 104, 118, 92 S. Ct. 2294, 2304, 33 L. Ed. 2d 222, 233 (1972) ("*Tinker* made clear that school property may not be declared off limits for expressive activity by students"). *See also Shelton v. Tucker*, 364 U.S. 479, 487, 81 S. Ct. 247, 251, 5 L. Ed. 2d 231, 237 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

In *Tinker*, the Supreme Court emphasized that the First Amendment protections afforded students extend to the "cafeteria," the "playing field," or simply being "on the campus during the authorized hours." *Tinker*, 393 U.S. at 512–513, 89 S. Ct. at 740, 21 L. Ed. 2d at 741. Elementary schools are not exempted from these constitutional demands. *See Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) ("nothing in the first amendment postpones the right of religious speech until high school"); *Denooyer v. Merinelli*, No. 92-2080, 1993 WL 477030 (6th Cir. Nov. 18, 1993) (per curiam) (using *Tinker* and *Hazelwood* standards for deciding an elementary school free expression case) (copy attached).

These fundamental principles confirm that L.W.'s religious speech – reading and discussing his Bible during free time – is protected by the First Amendment.

2. Ban on religious speech is unconstitutional under *Tinker*

Student speech falls in one of three distinct categories, each governed by a different legal standard: (1) school-sponsored speech, which is governed by *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988); (2) vulgar, lewd, obscene, and plainly offensive speech, which is governed by *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct.

3159, 92 L. Ed. 2d 549 (1986); and (3) all other student speech not fitting into the previous two categories, which is governed by *Tinker*.

a. *Tinker* controls analysis

L.W.'s speech is not school sponsored, that is, speech "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood*, 484 U.S. at 271, 108 S. Ct. at 570, 98 L. Ed. 2d at 605. Rather, his speech is entirely private. Thus, *Hazelwood* does not apply. *Fraser* is also inapplicable because L.W.'s religious speech is not "offensively lewd and indecent." *Fraser*, 478 U.S. at 683, 106 S. Ct. at 3164, 92 L. Ed. 2d at 558. Therefore, *Tinker* is the appropriate standard for judging the speech in this case.

Under *Tinker*, prohibitions on student speech are unconstitutional unless there is a showing that the speech would "materially and substantially interfere with the requirement of appropriate discipline in the operation of the school" or "impinge upon the rights of other students." *Tinker*, 393 U.S. at 509, 89 S. Ct. at 738, 21 L. Ed. 2d at 739. As the record reflects, L.W.'s speech was in no way disruptive to the operation of the school. He was peacefully reading and discussing his Bible during recess. His speech does not invade the rights of other students, who remain free to take part in their own recess activities or to voluntarily engage L.W. in private conversation. (Compl. ¶¶ 27–29). Moreover, L.W.'s informal activity obviously presents no safety concerns.[5]

b. Recess is non-instructional time

Any claim that Bible discussion would interfere with operation of the school is significantly undermined by L.W.'s expressed intention to only engage in such activity during recess. Schools have far less control over student speech during non-instructional time.

[5] It bears emphasis that the activity barred by KES amounts to nothing more than a few children gathering in the corner of the playground during recess and engaging in peaceful discussion.

Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 119 (D. Mass. 2003) ("Courts are more deferential when school shape the bounds of their curriculum . . . than when schools try to shape the bounds of private speech that occurs during non-instructional time between classes, *during recess*, in the cafeteria, on the playing field, or other designated 'free time' during the school day") (emphasis supplied). And courts invariably treat recess as non-instructional time. *See, e.g., Christopher S. ex rel. Rita S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004) (in absence of skills being learned, recess is non-instructional time); *Walz ex rel. Walz v. Egg Harbor Township Bd. of Educ.*, 187 F. Supp. 2d 232, 238 (D.N.J. 2002) (lunch and recess deemed non-instructional time); *Daugherty v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897, 915 (W.D. Mich. 2000) (lunch recess considered non-instructional time).[6]

Recess at KES is no different despite hollow claims to the contrary.[7] In purported support for recess being instructional time, Defendants state that students must remain on campus and the teachers are at liberty to require a child to make up deficient school work, or "sit out" for disciplinary reasons, during recess. (Answer ¶¶ 21-22). Even assuming such to be true, these innocuous events do not qualify the period as instructional time. Of particular importance, missing is any actual instruction.

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[6] Additionally, consider as a parallel the definition of "non-instructional time" under the Equal Access Act, 20 U.S.C. § 4072(4) (1990), which contrasts "non-instructional time" with "actual classroom instruction." The Department of Justice and the Secretary of Education have interpreted this definition of "non-instructional time" to include recess. *See Ceniceros ex rel Risser v. Bd. of Educ. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 884 (9th Cir. 1997) (Lay, J., dissenting).

[7] In fact, not only do teachers decline to instruct during recess, being a free time for the children, the teachers do not even interact with the children unless there is a disturbance. (Ex. "B").

c. Offense is not material disruption

The only demonstrable reason for prompting the silencing of L.W.'s speech is that it bothered a parent of another student. Needless to state, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508, 89 S. Ct. at 737, 21 L. Ed. 2d at 739. Indeed, the Supreme Court has rejected the argument that the government can restrict speech in order to protect the sensibilities of potential listeners. *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988). As exemplified in *Tinker*, where students wore controversial armbands protesting the Vietnam War, "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001). In this case, as in *Tinker*, there is no evidence of actual "interference . . . with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Tinker*, 393 U.S. at 508, 89 S. Ct. at 737, 21 L. Ed. 2d at 738. Therefore, the school has no constitutional basis to quell L.W.'s expression.

3. Establishment Clause cannot justify ban on religious speech

KES officials apparently rest their prohibition on Bible discussion upon the notion that the activity would be a violation of the so-called doctrine of "separation of church and state." (Compl. ¶ 38). This position is antithetical to the basic constitutional principles of the free exercise of religion and the prohibition on religious establishment. The Establishment Clause does not limit the rights of individuals to act on their own behalf according to the dictates of their conscience. As the Supreme Court makes plain, "there is a crucial difference between

government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250, 110 S. Ct. 2356, 2372, 110 L. Ed. 2d 191, 215–216 (1990) (emphasis in original).

Merely accommodating private religious speech – on an equal basis as all other speech – does not violate the Establishment Clause. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641, 98 S. Ct. 1322, 1335, 55 L. Ed. 2d 593, 610 (1978) (Brennan, J., concurring). And this principle is not diminished because the religious speech at issue happens to take place on a school campus. The Supreme Court recognizes that "throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public school and their students." *Lee v. Weisman*, 505 U.S. 577, 598-99, 112 S. Ct. 2649, 2661, 120 L. Ed. 2d 467, 488 (1992). *See Ceniceros v. San Diego Unified School Dist.*, 66 F. 3d 1535 (9th Cir. 1995) (held allowance of students to meet on school premises for purpose of religious expression during school day does not violate First Amendment).[8]

[8] Because of the confusion amongst school administers concerning the "separation of church and state," former Secretary of Education Richard Riley issued guidelines in 1995 pertaining to student religious expression, offering the following admonitions:

Student Prayer and Religious Discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. *Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other Scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities.* Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities; they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a non-disruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting.

Ultimately, the school's fear of violating the Establishment Clause is "largely self-imposed." *Mergens*, 496 U.S. at 251, 110 S. Ct. at 2372, 110 L. Ed. 2d at 216. KES has the responsibility to disassociate with its students' speech – not to force students to self-censor:

> [T]he desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but . . . instead it is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the schools can teach anything at all.

Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1055 (9th Cir. 2003) (citation and editing marks omitted).

4. Ban on religious speech constitutes viewpoint discrimination

The government engages in viewpoint discrimination when it excludes speech on an otherwise includible subject because of its perspective. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567, 582 (1985). Absent compelling justification, viewpoint discrimination is always unconstitutional, regardless of the context or environment in which it takes place. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700, 715 (1995); *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001). Such practices are "blatant" and

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Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other subject to the same rules of order as applied to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Religious Expression in Public Schools, Directive of Richard Riley, Secretary of Education (1995) (emphasis supplied).

"egregious" First Amendment violations. *Rosenberger*, 515 U.S. at 829, 115 S. Ct. at 2516, 132 L. Ed. 2d at 715.

Excluding a religious perspective on an otherwise permissible subject is an obvious form of viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). In both *Good News Club* and *Lamb's Chapel*, schools opened their facilities for broad social, civic, and recreational uses but prohibited religious groups from using the facilities. *Good News*, 533 U.S. at 102–103, 121 S. Ct. at 2098, 150 L. Ed. 2d at 160; *Lamb's Chapel*, 508 U.S. at 387, 113 S. Ct. at 2144, 124 L. Ed. 2d at 358. The Supreme Court found these practices unconstitutional, holding that speech on an otherwise includible subject could not be excluded because of its religious perspective. *Good News Club*, 533 U.S. at 111–112, 121 S. Ct. at 2102, 150 L. Ed. 2d at 166; *Lamb's Chapel*, 508 U.S. at 394, 113 S. Ct. at 2147, 124 L. Ed. 2d at 362.

Here, the sole basis proffered by KES officials for prohibiting students from reading and discussing the Bible during recess is the book's religious perspective. They permit students to read and discuss other written materials during recess (Compl. ¶ 23), but they single out the Bible as the only prohibited book (Compl. ¶¶ 41–42), purely because of its religious viewpoint. This is the very definition of viewpoint discrimination, and it cannot be tolerated.

B. Violates Free Exercise of Religion

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472, 490 (1993) (citations omitted).

Moreover, it protects "not only the right to hold a particular belief, but also the right to engage in conduct motivated by that belief." *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 427 (6th Cir. 2002) (citation omitted).

Reading and discussing the Bible is a central tenet of L.W.'s Christian faith – which motivates him to read the Bible and discuss it during his free time. (Compl. ¶¶ 16, 25-27). L.W. cannot check his Christianity at the school gate, thus, he desires to engage in Bible reading and discussion with another student during recess.[9] Yet, Principal Summa demanded that they stop the activity and has barred L.W. and other students from bringing their Bibles to school again. (Compl. ¶ 33; Ex. "C"; Ex. "E"). This absolute ban on student-initiated Bible reading and discussion substantially burdens the exercise of L.W.'s religion.[10]

A government regulation that burdens an individual's free exercise of religion is subject to strict scrutiny unless it is generally applicable, not aimed at particular religious practices, and free of a system of particularized exceptions. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876, 886 (1990); *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000). Here, the school's absolute ban on reading and discussing the Bible at recess is singularly aimed at a particular religious practice. Students regularly gather at recess to engage in free activity, which includes reading and discussing other written materials, like American Girl Doll magazines, and Harry Potter books,

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[9] As explained in the Verified Complaint, L.W. "sincerely believes that his faith is inseparable from his very being and that he is not at liberty to be a Christian sometimes and ignore his faith at other times. (Compl. ¶ 15).

[10] Similarly, Article I, Section 3 of the Tennessee Constitution provides: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. . . ." The Tennessee Supreme Court "has consistently construed and applied the free exercise protections in Tenn. Const. art. I, § 3 using the same principles employed by the United States Supreme Court to interpret the Free Exercise Clause of the First Amendment." *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761 (Tenn. App. 2001).

without interference from the school (Compl. ¶¶ 23-24; Ex. "A"; Ex. "B"; Ex. "D"; Ex. "E"), but they are forbidden from doing the same with the Bible. A ban such as this that targets a religious exercise for disfavored treatment is, without question, "not generally applicable." And, as explained above, the school lacks even a legitimate – much less compelling – justification for its policy. Thus, the ban cannot withstand scrutiny.

C. Violates Establishment of Religion

"[The] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S. Ct. 266, 270, 21 L. Ed. 2d 228, 234 (1968). The State certainly "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225, 83 S. Ct. 1560, 1573, 10 L. Ed. 2d 844, 860 (1963); *see also Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005) (state may "neither abdicate [its] responsibility to maintain a division between church and state nor evince a hostility to religion").

Unconstitutional hostility towards religion is determined by considering the perspective of a reasonable observer. *Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997). "If a reasonable observer would conclude that the message communicated is one of . . . disapproval of religion, then the challenged practice is unlawful." *Id.* For example, the Supreme Court found that a reasonable observer would view a school excluding religious groups from facilities open to non-religious groups as hostility toward religion. *Mergens*, 496 U.S. at 248, 110 S. Ct. at 2371, 110 L. Ed. 2d at 214; *see also Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp 2d 897, 908 (W.D. Mich. 2000). Similarly, the Sixth Circuit concluded that a reasonable observer would infer disapproval of religion if a school refused to distribute fliers advertising religious activities

but distributed fliers advertising other kinds of activities. *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 423 (6th Cir. 2004).

In this matter, the school's actions reveal blatant hostility towards religion, regardless of whether the reasonable observers are parents or classmates. *See Rusk*, 379 F. 3d. at 420-21 (holding that parents, rather than students, are relevant audience for fliers placed in student mailboxes). When Principal Summa learned that L.W. was reading and discussing his Bible during recess, she required that he stop his activities, put his Bible away, and cease bringing his Bible to school. (Compl. ¶ 33). Principal Summa made it clear to the students that reading or discussing the Bible was not only strongly disapproved, but subject to reprimand. (Compl. ¶¶ 34, 35; Ex. "C"; Ex. "E"). And the school did not stop there. Principal Summa then sent a letter to parents informing them that Bible discussion would not be tolerated on KES grounds during recess. (Compl. ¶ 42; Ex. "F"). A reasonable student or parent would understand Principal Summa and the Board's words, actions, and unqualified ban on the Bible to represent disapproval of religion and a desire to discourage L.W. and other children from participating in a religious activity.[11]

As in *Mergens* and *Rusk*, Defendants in this case reveal their hostility toward religion by prohibiting religious activities of exactly the same kind as the secular ones they allow. Principal Summa and the Board permit the discussion and reading of nonreligious material at recess, yet they ban the Bible and have since indicated that other religious material is inappropriate as well.

[11] This is exemplified by the affidavits submitted with this Motion. Mrs. Loveday avers that her daughter does not take her Bible to school out of fear, and is made to feel that it is improper for her to act pursuant to her Christian faith. Mrs. Loveday is appalled by the discrimination against their religion. (Ex. "E"). Mr. Webster is likewise disturbed that the school is effectively communicating to his daughter, who was told by her homeroom teacher that she could not read her Bible at recess, that there is something inappropriate about her faith. (Ex. "C").

(Compl. ¶¶ 33, 46). Their actions and stated motive[12] make clear that Principal Summa and the Board are singling out religion for hostility instead of approaching it with neutrality. Taking away the Bible and discouraging religious practice, while allowing other forms of activity and discussion, demonstrates egregious hostility toward religion, evident to any reasonable observer. Defendants' hostile practices and policies are in direct violation of the Establishment Clause.

D. Violates Due Process

Under the vagueness proscription of the Due Process Clause, "laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2299, 33 L. Ed. 2d at 227. Vague policies violate two fundamental principles of due process: (1) they leave the public guessing as to what speech is proscribed; and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion to enforcement officials. *Id.* at 109, 92 S. Ct. at 2299, 33 L. Ed. 2d at 228.

Thus, "a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763, 108 S. Ct. 2138, 2147, 100 L. Ed. 2d 771, 787 (1988); *see also Southworth v. Bd. of Regents of Univ. of Wisconsin Sys.*, 307 F.3d 566, 579-80 (7th Cir. 2002) (the corollary to viewpoint neutrality is "a prohibition on unbridled discretion."). This is especially problematic when First Amendment liberties are at stake – unbridled discretion breeds the danger of self-censorship. As a result, when a regulation interferes with First Amendment rights, "a more stringent vagueness test

[12] Principal Summa is clearly seeking to avoid any religious expression during recess. To justify her ban on the Bible to parents, she stated that students may not have the Bible at recess because "then we would have to let the Muslims do their thing." (Comp. ¶ 46).

should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 1194, 71 L. Ed. 2d 362, 372 (1982).

Vagueness is most egregious when, as here, no guidelines are provided at all. The school has no express prohibition on reading or discussing the Bible at recess. Instead, Principal Summa imposed such a restriction on an *ad hoc* basis. As a result, the students, like L.W., simply had no way of knowing that the Bible was prohibited at recess; such arbitrary application of unwritten policies is the very definition of vagueness.

E. Violates Equal Protection

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985). If similarly-situated persons receive disparate treatment and that treatment invades a fundamental right such as speech or religious freedom, the defendants' actions "are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1916, 100 L. Ed. 2d. 465, 471 (1988); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 806-07 (E.D. Mich. 2003) (prohibiting students from expressing their viewpoint that homosexuality is wrong failed strict scrutiny and violated Equal Protection Clause).

As shown herein, the school has forbidden L.W. and other students from ever reading or discussing the Bible during recess. This restriction on religious speech unquestionably invades the fundamental rights of free speech and the free exercise of religion. By allowing similarly-situated students to engage in any other conceivable non-disruptive activity, including but not limited to the discussion of non-religious materials, during recess, while eliminating Bible discussion without any legitimate justification, the school is violating the Equal Protection Clause.

This discrimination is vividly illustrated by the comparison and contrast of how the school views American Girl Doll magazines on one hand, and Bibles on the other. Students at KES are free to read American Girl Doll magazines and discuss the contents thereof at their leisure during recess on the playground. (Ex. "A").[13] But, an attempt to read and discuss Bibles at the same time and same location classifies as a "study" and subjects the children to a reprimand.

II. L.W. HAS SUFFERED AND IS SUFFERING IRREPARABLE HARM

Any infringement on First Amendment liberties is sufficient to justify injunctive relief. By showing a likelihood of success on the merits of a First Amendment claim a plaintiff demonstrates irreparable harm. *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998). It is well established that "[t]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547, 565 (1976); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). And, as demonstrated herein, L.W. is suffering and will continue to suffer irreparable harm absent an injunction. His constitutional rights are subject to perpetual infringement.

III. PRELIMINARY INJUNCTION WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS

An injunction will not interfere with the school's ability to carry out its educational mission or with the rights of other students. School officials have comprehensive authority to control conduct in the schools, but only as far as is consistent with fundamental constitutional safeguards. *Tinker*, 393 U.S. at 507, 89 S. Ct. at 737, 21 L. Ed. 2d at 738. An injunction would

[13] The same goes for Harry Potter books. At recess, children can gather on the playground to read and discuss these books at their leisure. (Ex. "E").

merely preserve the students' constitutional right to read and discuss Bible passages during recess. It would not require the school to convert recess into an organized time for school-sponsored club meetings. In no way would it impair the school's ability to maintain appropriate discipline -- school officials would retain their authority to prohibit and deal with disruptive behavior. Other students will not be harmed by an injunction because L.W.'s private peaceable recess activity does not cause a disturbance that disrupts the school environment. Rather than encroaching on other students' rights or interfering with the school's educational mission, an injunction would simply safeguard the students' First Amendment liberties against further violation.

IV. PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

"It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). Specifically, "the public as a whole has a significant interest in . . . protection of First Amendment liberties." *Dayton Area Visually Impaired Pers., Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995). Moreover, the public interest is greatly served by teaching students about their First Amendment freedoms, particularly in their formative years: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S. Ct. 1178, 1185, 87 L. Ed. 1628, 1637 (1943).

Under the United States and Tennessee State Constitutions, L.W. enjoys the right to read his Bible and discuss it during recess. An injunction is necessary to help the students understand their rights and the principle that the government is not to be hostile to religious beliefs.

CONCLUSION

As he heads into fifth grade at KES, L.W. continues to suffer irreparable harm to his fundamental constitutional rights at the hands of Principal Summa and the Board. By discriminating against his religious viewpoint, Defendants are violating L.W.'s constitutional rights and exhibiting blatant hostility towards his religion. A preliminary injunction is necessary to preserve L.W.'s constitutional freedoms while this case is pending. Hence, Plaintiff respectfully requests this Court grant his motion and issue a preliminary injunction allowing students to read and discuss their Bibles during recess as long as such activity does not materially and substantially interfere with appropriate discipline in the operation of the school or impinge on the rights of other students.

Dated: September 19, 2005

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Certificate of Service

I hereby certify that on the 19th day of September, 2005, a copy of the foregoing Memorandum in Support of Plaintiff's Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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